

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
JOSEPH TIRACO, :
:
Plaintiff, : 12-CV-2273 (KAM) (MDG)
:
August 16, 2012
:
V. : Brooklyn, New York
:
NEW YORK STATE BOARD OF :
ELECTIONS, et al., :
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: JACK L. LESTER, ESQ.

For the Defendant: JOSHUA PEPPER, EQ.
STEPHEN KITZINGER, ESQ.

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1 THE CLERK: Civil cause for initial
2 conference, Tiraco v. New York State Board of
3 Elections, docket number 12-CV-2273.

4 Counsel, please state your name for the
5 record, starting with the plaintiff.

6 MR. LESTER: Your Honor, good morning. My
7 name is Jack Lester and I represent the plaintiff,
8 Joseph Tiraco.

9 MR. PEPPER: Joshua Pepper, Assistant
10 Attorney General, representing the New York State Board
11 of Elections.

12 MR. KITZINGER: Stephen Kitzynger, New York
13 City Law Department, for defendant Board of Elections
14 in the City of New York.

15 MR. CHURCHMAN: Steven A. Churchman (ph),
16 general counsel for the respondent Board of Elections
17 in the City of New York.

18 THE COURT: Good morning all.

19 Have the parties had an opportunity to
20 discuss the proposed scheduling order?

21 MR. KITZINGER: Your Honor, if I may. This
22 is sort of an odd situation because we've got a pro se
23 amended complaint. The City Board has answered. The
24 State Board has submitted a pre-motion letter to Judge
25 Matsumoto. New counsel for plaintiff has requested

1 that we consent to a second amended complaint. We've
2 had some brief discussions earlier today -- this is the
3 first time Mr. Lester has been available because I
4 believe he's been on trial -- about what the actual
5 complaint is.

6 We haven't actually -- we don't -- the City
7 Board doesn't understand what the actual allegations
8 are against the City Board, what it's alleged we did,
9 how there was any sort of disparate treatment. And as
10 such, we're certainly not in a position to consent to
11 the filing of a second amended complaint, now that the
12 time to do so has expired and there's no right to do so
13 under Rule 15. And quite candidly, I don't think,
14 based on the proposed second amended complaint, a
15 motion for leave to file it would be granted.

16 They want to sue Frank McKay (ph), which is
17 what the second amended complaint seeks to do, add
18 Frank McKay, who is the head of the State Independence
19 Party, as a defendant and pursue claims against him.
20 It doesn't relate to the acts of the City Board or, for
21 that matter, the State Board. If he wanted to drop us
22 and sue Frank McKay, I'm sure Mr. Pepper would
23 stipulate to that.

24 But we're just at a loss as to what the
25 actual complaint is because this was sort of an odd

1 year with redistricting and the failure of the state
2 legislature to come to terms with the new legislative
3 map. We had -- the Northern District of New York set
4 the number of signatures to be collected at 75% of the
5 ordinary statutory limit, and we had this Court draw
6 the congressional district lines, and handed down the
7 order the day before the petition started.

8 And to its credit, everything was made
9 available publicly for free, posted on the front page
10 of the web site. There were links to the maps on the
11 web site, which this Court -- drafted by the special
12 master and then adopted by the three-judge panel. So
13 we're sort of at a loss as to what the complaint is
14 about the City Board, and I'm sure the State Board
15 would feel the same way about complaints against it.

16 We also litigated a similar case for an
17 Independence Party nomination for the congressional
18 district that covers Staten Island and part of
19 Brooklyn, in Richmond Supreme Court. And there, the
20 court found that neither the City Board nor the State
21 Board acted improperly. I'm sort of at a loss to
22 understand why we're here, what the federal claim is on
23 top of everything else. Neither the City Board nor the
24 State Board acted improperly -- what the federal issue,
25 especially following the 2007 Second Circuit decision

1 in Rivera Powell v. The Board of Elections (ph).

2 So if we could maybe have plaintiff's
3 counsel shed a little light on what the claims are or
4 how he had to take it to federal court, maybe then we
5 would be in a better position to have a discussion on
6 whether this case really needs to go forward and if so,
7 what sort of schedule it should be.

8 MR. LESTER: Your Honor, if I may.

9 THE COURT: Go ahead, Mr. Lester.

10 MR. LESTER: Once again, Mr. Lester on
11 behalf of Joseph Tiraco.

12 Mr. Tiraco was a candidate for Congress in
13 Queens and attempted, through the normal process,
14 petitioning process, to secure a place on the ballot.
15 However, when Mr. Tiraco went to the Board of Elections
16 to attempt to get information specifically required for
17 his ability to obtain ballot access, for example ED
18 lists, summary district lists, the map showing ED's and
19 AD's with Independence Party enrollment contained
20 therein, this information was denied to Mr. Tiraco.

21 So that there was information made publicly
22 available, we acknowledge that. But the specific
23 information that was needed for Mr. Tiraco to get the
24 signatures from eligible Independence Party voters was
25 denied to Mr. Tiraco.

1 We intend -- what Mr. Tiraco did in his pro
2 se complaint -- contended that this was done in a
3 disparate, discriminatory fashion against candidates
4 who are so called insurgent independent candidates. So
5 he had filed the pro se complaint on this issue after
6 this matter was heard in the New York State court. He
7 was removed from the ballot. This issue was raised by
8 his counsel at a hearing in the New York State court.
9 He was told in the New York State court that the issues
10 that you're raising here are federal, constitutional
11 issues, file a federal complaint, which he did.

12 When Mr. Tiraco approached me and we
13 researched and looked into this matter, there was
14 another issue, and that was the way that the county
15 leaders had denied associational rights to party
16 members, in the way that they designated nonparty
17 members as candidates for elective office through
18 what's known as a Wilson (ui) designation.

19 New York State law allows an individual
20 who's not enrolled in a party to get that party's
21 designation, if a committee of that party so
22 designates. And the way that process worked was also
23 discriminatory and violated this individual's
24 constitutional rights, so we added that as a cause of
25 action.

1 THE COURT: What's the protected class?

2 MR. LESTER: The right to franchise, the
3 right to vote, an individual who's a candidate and also
4 a voter.

5 THE COURT: Discrimination on what basis?

6 MR. LESTER: Denying an individual the right
7 to ballot access, the right to association, the right
8 to vote. The protected class is -- because it's a
9 fundamental right, the right to vote, the right to
10 association, the right to ballot access, there has to
11 be strict scrutiny as to the way the state treats an
12 individual.

13 There is case precedent. Your Honor, I
14 prepared a supplemental summons and complaint, which I
15 can hand up. We cite precedent, we cite cases. If
16 they have an issue with it and would like to make a
17 motion to dismiss and we can argue this in a systematic
18 way. But we do raise all these issues and we do cite
19 precedent.

20 THE COURT: Have you shared the proposed
21 amended complaint with the defendants?

22 MR. LESTER: Yes, I have.

23 MR. KITZINGER: Your Honor, I have it here
24 and I don't see any precedent cited in here.

25 THE COURT: Well, it's not normal to have

1 cases cited in a complaint.

2 MR. KITZINGER: Right, but it's normal to
3 actually allege the statutes that we allegedly
4 violated. For example, the enrollment list is required
5 by statute to be published by the first day of April.
6 They were. They were put together by the collection
7 district, bound together in a volume by assembly
8 district, as directed and allowed by state law. We're
9 just at a loss as to what we allegedly did wrong and
10 what -- who else was treated allegedly differently.

11 In the absence of that, it seems like it's
12 certainly a waste of the Court's time to be dealing
13 with complaints that are completely devoid of facts
14 that would support a plausible claim for relief, and we
15 have the city and state government as well who has to
16 deal with this.

17 MR. LESTER: Judge, I do in the complaint,
18 paragraph 43 and 44, cite almost eight different acts
19 that we allege the Board of Elections undertook
20 intentionally, depriving Mr. Tiraco of ballot access.
21 A map of the congressional district setting forth the
22 election district, the assembly district, the
23 Independence Party enrollment book for the
24 congressional district, the number of enrolled
25 Independence Party voters in the congressional

1 district, the number of signatures needed to qualify.

2 THE COURT: He didn't know before running
3 how many signatures he needed?

4 MR. LESTER: No, because -- again, this is
5 all set forth, because it's based on percentage of the
6 independent voters. Again, these are factual issues
7 which we're happy to go through. But the complaint, as
8 I say, does set forth the specific allegations, it does
9 cite the causes of action under federal statute and so
10 forth. There is case -- I mis-spoke. I don't cite the
11 case precedent here but there is case precedent for all
12 of these allegations. We've well researched and I'm
13 prepared, if a motion to dismiss is made, to contest
14 that motion.

15 MR. KITZINGER: Your Honor --

16 THE COURT: Could you give me a copy of the
17 proposed complaint?

18 MR. LESTER: Yes.

19 MR. KITZINGER: Your Honor, if I may, it's
20 on page 10. For example, there are allegations that
21 the board, some board, whether the State Board or City
22 Board, I don't know which one -- it's not clear in the
23 complaint. The amended complaint indicates he called
24 the State Board of Elections, so I don't know why he's
25 suing the City Board if that's the case.

1 Moreover, there's no allegation that there
2 was actually a requirement for the City Board, for my
3 client to produce any of these items. And if there's
4 no requirement to produce them and they weren't
5 produced for anyone else, it's sort of difficult to
6 understand what the complaint is.

7 And with regard to the number of signatures
8 required for ballot access, I believe the State Board
9 published that information on or about the Monday
10 following this Court's decision setting forth the
11 boundaries. Obviously, it takes a couple of days to
12 put the addresses and the voter data into the computer
13 based on the geographic boundaries and run the numbers,
14 but that information, to my recollection from the prior
15 cases, was published on the State Board web site on the
16 Monday following this Court's ruling setting the
17 boundaries.

18 MR. LESTER: These are factual allegations
19 which are simply not true. My client was there. My
20 client, Mr. Tiraco, is on the record -- his counsel is
21 on the record with these facts in the hearing held in
22 the state court. This information was given to other
23 candidates and not given to Mr. Tiraco through
24 disparate treatment.

25 THE COURT: I have to say, I'm a little

1 shocked by your allegation that there was no
2 congressional district map available. That was posted
3 on this Court's web site.

4 MR. LESTER: No, setting forth election
5 district and assembly district, because that's how they
6 get -- the map was available publicly, but a map of the
7 congressional district, setting for the ED's and AB's,
8 which were required for Mr. Tiraco to get signatures.
9 The way the enrollment books are published, they're
10 published for ED's and AB's, and in order for them to
11 know where the Independence Party enrolled voters are
12 located, whether that ED or AB is within the
13 congressional district becomes a critical factor, and
14 that's what was not provided.

15 MR. TIRACO: (Ui).

16 MR. LESTER: I mean, this could be developed
17 factually in greater detail. However, this was -- this
18 was the claim again that was made when they had a
19 hearing in the state court, because Mr. Tiraco first
20 had an opportunity to petition the Board of Elections
21 and then to bring a proceeding in state court. There's
22 a transcript of that entire hearing where this was
23 brought out, all the information that was denied to Mr.
24 Tiraco that was provided to other candidates. He was
25 told at that time that his remedy was in federal court,

1 which is why he filed a pro se complaint.

2 MR. PEPPER: I mean, I'm willing to assume
3 for purposes of my motion to dismiss that he made these
4 requests and were denied them. We'll dispute the facts
5 later if we have to but it doesn't matter for purposes
6 of the motion to dismiss. My grounds for the motion
7 are set forth in my pre-motion letter, which you have.
8 And since we're actually supposed to appear to talk
9 about discovery, let me suggest that since the Eleventh
10 Amendment essentially shields us --

11 THE COURT: You're not excused from
12 discovery.

13 MR. PEPPER: The Eleventh Amendment does
14 exactly that. In fact, I can cite a Second Circuit
15 case that says this.

16 THE COURT: Just one second, just one
17 second.

18 I did briefly take a look at the proposed
19 second amended complaint. You may disagree with the
20 factual underpinnings of the complaint, but I would
21 think it would be far better to proceed on your motion
22 with a complaint that's not drafted by a pro se
23 litigant.

24 MR. PEPPER: Well, that's fine. If we're
25 just talking about whether he's going to be entitled to

1 file the second amended complaint, he can do that. We
2 can submit another pre-motion letter and go through it
3 again. I don't have a problem with that. But I still
4 say that, you know -- I can cite the case of Smith v.
5 Reagan, 841 F.2d 28. We can't even be compelled to
6 participate in discovery. That's what the Eleventh
7 Amendment says. And I would suggest that we simply
8 stay discovery pending the motion to dismiss.

9 MR. KITZINGER: Your Honor, the City Board
10 has strong objection to the filing of the second
11 amended complaint for a number of reasons, not the
12 least of which is, there are allegations in here which
13 are completely unrelated to anything that the City has
14 done. Most of the allegations in the second amended
15 complaint relate to actions that are alleged to have
16 been taken by Frank McKay, who is not part of the City
17 Board, not part of the State Board, not part of any
18 government, as far as I know.

19 As a result, it's inappropriate to be
20 burdening this Court -- he's not a state actor so he's
21 not (ui) either, it would seem. So it seems to be
22 complaining a whole mess of issues but more
23 importantly, this complaint -- I believe this proposed
24 second amended complaint violates Rule 11, in that
25 there are allegations that we didn't do anything --

1 didn't do things that we were required to do, which
2 this election law of the State of New York clearly does
3 not require us to do.

4 I would really suggest that before any
5 attempt is made to file a complaint like this, that Mr.
6 Lester actually review the electoral law and the
7 obligation of the City Board of Elections and the State
8 Board of Elections, for that matter, before he throws
9 out allegations that we violated his client's
10 constitutional rights.

11 I would also suggest that he look at Rivera
12 Powell v. The Board of Elections (ph) and Exxon Mobil,
13 which talks about the Rooker Feldman Doctrine, because
14 if you're litigating in state court -- I don't care who
15 told him it was a federal claim. If he was litigating
16 it and he raised the claims and he lost, he lost.

17 THE COURT: I do think Exxon substantially
18 cut back on Rooker Feldman and Mocchio (ph) no longer
19 applies. So I'm --

20 MR. KITZINGER: Well, Mocchio is clearly
21 gone, but if he fully litigated the claims or had the
22 opportunity --

23 THE COURT: We don't really know if he did.

24 MR. KITZINGER: He said he raised them and
25 you need to --

1 THE COURT: If it wasn't decided by the
2 state court, it may not be binding. I don't know. I
3 really don't know. If you didn't participate in the
4 state court proceeding, then you may not be in a
5 position to know what was determined, if anything, in
6 state court.

7 MR. KITZINGER: We should have been a named
8 defendant, because you can't get on the ballot if you
9 don't (ui) City Board.

10 THE COURT: Well, anyway, whatever the case
11 may be. It probably was an ill-conceived litigation in
12 state court.

13 MR. KITZINGER: Well, that's not our fault.
14 But the allegations about -- what Mr. Tiraco just said
15 about, he had a two-year-old enrollment book -- one,
16 you've got to buy the enrollment books from the Board
17 of Elections. And two, they're produced twice a year,
18 and you have to buy new ones. You can't --

19 MR. TIRACO: That's the one I had to buy is
20 the two-year-old one. That's the one they gave me.

21 THE COURT: I'm inclined to grant leave but
22 I do think, in light of what Mr. Kitzinger has said,
23 you ought to reconsider some of the allegations set
24 forth therein. Perhaps it may be useful for counsel to
25 confer on what might be an appropriate -- what

1 allegations they think are just totally contrary to the
2 law.

3 MR. LESTER: I think Mr. Kitzinger is
4 misconstruing what we're saying. We're not saying that
5 the Board of Elections necessarily violated state
6 statutory obligation. We're saying, in the way the
7 Board of Elections carried out or conducted themselves
8 through the petitioning process, it was done in such a
9 manner to deny this individual and other similarly
10 situated ballot access. It's fundamentally a ballot
11 access --

12 THE COURT: I understand what you're trying
13 to say but I think there may be some factual
14 misunderstanding on your part, so I would -- I do think
15 that it is in everybody's benefit to have the theories
16 of the plaintiff clearly articulated, so that the Court
17 won't be trying to discern from the amended complaint
18 what the theories are. So I'll grant leave to file a
19 second amended complaint, asserting the causes of
20 action that you've asserted. But I'm just asking you,
21 Mr. Lester, to heed Mr. Kitzinger and Mr. Pepper's
22 comments and review the factual allegations.

23 MR. LESTER: Your Honor, if I may.
24 Certainly, I'd be more than happy to do that. My
25 investigation of the facts up to this point is

1 obviously based on interviews I've had with my client
2 and other sources. If Mr. Kitzinger has information
3 that contradicts anything that I have and it's
4 definitively established, I'd be happy certainly to
5 (ui) any misunderstandings that I have, but I believe
6 it's on solid ground.

7 THE COURT: Mr. Lester -- and perhaps it's
8 appropriate that I air my views. I share the view of
9 many that New York election laws are ridiculous. And
10 that being said, there is a ridiculous New York
11 election law bar, and that has come about because of
12 the intricacies of the law. I am not -- if I were to
13 vote, I would certainly be in favor of greater ballot
14 access.

15 That being said, the law is the law, and the
16 procedures have a lot to be -- the requirements and the
17 procedures may not be what ordinary citizens might
18 consider appropriate. But whether or not they raise a
19 constitutional violation is a separate issue. So I
20 would urge you, notwithstanding your research, to think
21 of it like a tax code. Whenever I research tax issues,
22 I worry about the issues I don't know to look at, and
23 that is certainly something you ought to keep in mind.

24 MR. KITZINGER: Your Honor, for (ui) sake, I
25 would really request that you withdraw your granting of

1 leave at the present time, until there has been a new
2 second amended -- proposed second amended complaint,
3 which clearly --

4 THE COURT: Look, the one thing you ought to
5 understand is, there may be factual disputes over what
6 occurred, so just don't waste time on that.

7 MR. KITZINGER: Your Honor, is the granting
8 of leave that you're --

9 THE COURT: I said I'm inclined to, yes,
10 grant leave.

11 MR. KITZINGER: Is it going to include
12 granting leave to add Frank McKay as a defendant, when
13 all of the claims against him have nothing to do with
14 the City or State Boards? Is it going to require Mr.
15 Lester to make the allegations clear as to not the
16 Board of Elections but whether they're talking about
17 the City Board or State Board? I mean, these things
18 are pretty fundamental and --

19 THE COURT: They are not less articulated in
20 the second amended complaint than in the amended
21 complaint. There is more there. So if you want to
22 work off the amended complaint, you have my blessings,
23 and then you can get a court opinion and then address -
24 - it's hard for me to believe, in this procedural
25 context, that any order granting a motion to dismiss

1 would be without leave to replead.

2 MR. KITZINGER: Your Honor, in the amended
3 complaint drafted by Mr. Tiraco, he says the State
4 Board of Elections did A, B and C. He spoke to the --
5 he called the State Board of Elections.

6 THE COURT: I'm saying there's more against
7 the City. To the extent that you don't think it's
8 adequate, so be it.

9 MR. KITZINGER: Your Honor, it just says
10 Board of Elections here. It doesn't distinguish, is
11 the problem.

12 THE COURT: Okay. Well, Mr. Lester should
13 heed your comments. If you want to go through a formal
14 motion, fine, I'll set a motion schedule.

15 MR. KITZINGER: What about adding Frank
16 McKay?

17 THE COURT: I haven't read it carefully
18 enough. Certainly, Mr. Lester now knows he has to
19 research the issue of whether or not Mr. McKay is a
20 state actor.

21 MR. LESTER: I haven't reached it. That's
22 why he's a state actor. There's a plethora of case
23 law. Party leaders acting in the nominating process --
24 the slew of cases -- have been determined to be state
25 actors. That was very carefully researched.

1 MR. KITZINGER: If I could just ask the
2 Court to direct Mr. Lester to make clear the
3 allegations -- against whom each allegation is made,
4 whether it's the City Board or the State Board or Mr.
5 McKay.

6 THE COURT: That's fair enough.

7 MR. KITZINGER: And to clearly delineate
8 which claims are being asserted against which
9 defendants.

10 THE COURT: I think that's fair enough. So
11 you are to redraft. You'll file it by -- float it by
12 the defendants, Mr. Pepper -- Mr. Lester, and if
13 there's a dispute, you'll set a short schedule for a
14 motion for leave to amend. But I'm telling the
15 defendants, defective or not, I'm inclined to grant the
16 motion -- motion for leave to amend.

17 MR. PEPPER: I'm not opposing that as far as
18 that goes, your Honor, although obviously, I still
19 intend to -- if you want to set a briefing schedule now
20 for a motion, that's fine with me, or if I do -- either
21 way.

22 THE COURT: I assume you'll withdraw your
23 pre-motion -- your letter for a pre-motion conference.

24 MR. PEPPER: If he files a second amended
25 complaint, then it's moot.

1 THE COURT: Yes. I just think it's to your
2 benefit to have an amended pleading.

3 MR. KITZINGER: Your Honor, yes, it would
4 be, if it were -- the second amended pleadings were
5 clear.

6 THE COURT: We're not going to go over what
7 we've already discussed. Mr. Lester will consider
8 what's been discussed, float out a proposed amended
9 complaint. You can file a letter application to me by
10 the end of next week?

11 MR. PEPPER: Yes.

12 THE COURT: And you'll tell me whether or
13 not there is consent. And if there's no consent,
14 opposition will be due the following week. So August
15 24th, you'll file a letter motion for leave to amend,
16 and any opposition will be on the 31st.

17 MR. KITZINGER: Your Honor, I am actually
18 out of the office on vacation with my family the next
19 two weeks. I will be in on the 27th but that's it.

20 THE COURT: Well, you're going to have to
21 get back to Mr. Lester one way or the other, sooner
22 rather than later. Can you get a proposed amended
23 complaint out by Friday noon? That's tomorrow, noon.

24 MR. KITZINGER: Your Honor --

25 THE COURT: You'll get it out by -- proposed

1 amended complaint by the 24th and you'll respond by the
2 27th with what your view is.

3 MR. KITZINGER: Yes, I will respond on the
4 27th as to whether or not --

5 MR. LESTER: Your Honor, the proposed
6 amended complaint by August 24th?

7 THE COURT: Yes.

8 MR. LESTER: So that's a week from Friday.

9 THE COURT: That's a week.

10 MR. KITZINGER: Preferably sent to me by e-
11 mail.

12 MR. LESTER: Yes.

13 THE COURT: Okay. And then you'll advise
14 Mr. Lester of your views. Let me just give you a week,
15 the 23rd.

16 MR. LESTER: The 23rd.

17 THE COURT: And both defendants will advise
18 Mr. Lester by the 28th whether or not you consent.

19 MR. LESTER: Just so I --

20 THE COURT: Actually, I don't need -- yes.

21 MR. LESTER: Just so I understand it, Mr.
22 Kitzinger would like me to, in separate causes of
23 action, allege what Frank McKay did and what the Board
24 did.

25 THE COURT: Mr. Kitzinger says that there

1 are several instances -- and it's true, you merely
2 refer to the Board, so you should clarify which one.

3 MR. LESTER: I'll clarify that.

4 THE COURT: And if you are in fact seeking
5 to assert a claim against only one defendant, you'll
6 specify which defendants you're asserting.

7 MR. LESTER: Right.

8 THE COURT: Or you'll say all the
9 defendants.

10 MR. LESTER: Right.

11 THE COURT: It will make it clear.

12 MR. LESTER: Thank you, Judge.

13 MR. KITZINGER: And the allegations
14 themselves, which --

15 THE COURT: I just said that. He'll specify
16 which defendant entity he's talking about.

17 MR. PEPPER: Just a point of clarification:
18 So right now, we're only talking the motion for leave
19 to file a proposed second amended complaint. We're not
20 talking about a motion to dismiss that second amended
21 complaint.

22 THE COURT: No, you can't, you can't. You
23 haven't seen it.

24 MR. PEPPER: Okay, all right. Then I'll
25 just wait.

1 THE COURT: And any application -- so the
2 defendants will respond by the 28th and any motion one
3 way or the other will be by the 31st. If there's
4 consent, then you'll just so state. And if there isn't
5 consent, then it will be a contested motion and the
6 defendants' response will be due the 7th.

7 Perhaps it makes sense for us, if there is
8 an amended complaint, to have another conference, but
9 I'll schedule that if I feel we need to have another
10 conference. Otherwise, I guess all we need to do is
11 discuss the discovery now. You have an idea of what
12 Mr. Lester's claims will be and the nature of the
13 discovery.

14 What discovery are you seeking, Mr. Lester?

15 MR. LESTER: Well, certainly the -- because
16 the allegations pertain to disparate treatment, we
17 would like to know -- we would like to have an
18 accounting of what was available to the Board of
19 Elections during the petitioning period, what was
20 distributed, all the records, communications, e-mails
21 that were kept on file during that period, names of
22 candidates and so forth. I could prepare a written
23 demand.

24 THE COURT: Okay. So it's just basically
25 written discovery.

1 MR. LESTER: Their files pertaining all of
2 the procedural aspects of what they did during that
3 petitioning period.

4 MR. KITZINGER: Your Honor --

5 MR. LESTER: Again, I could put it more
6 artfully in a written demand.

7 MR. KITZINGER: Mr. Lester (ui) the Board of
8 Elections office, either the general office at 32
9 Broadway or any of the borough offices, go to the
10 public access terminal, look at the ledger. He can go
11 to the various offices to get the petitions.

12 THE COURT: I think it might serve you well
13 to just start off with interrogatories, where this
14 information -- when and where this information was
15 provided.

16 MR. PEPPER: Can I suggest that, since it
17 appears that a motion to dismiss would be ultimately
18 successful anyway from your own comments, that we
19 simply put off discovery until that's decided?

20 THE COURT: No, because I think there are
21 going to be some factual disputes here, just based on
22 what I'm hearing. So I think your motion may be
23 premature.

24 MR. KITZINGER: Your Honor, based on my -- I
25 litigate virtually all of the election litigations in

1 the City of New York. I've litigated Rivera Powell,
2 I've litigated -- and almost every case disappears on a
3 Rule 12 motion, for the simple reason that Rivera
4 Powell precludes it. No one has yet pled an actual
5 federal claim in either the Eastern or Southern
6 District against the City Board of Elections since
7 Rivera Powell. No one has successfully pled a claim.

8 And I would just suggest that -- especially
9 if we're talking about e-discovery, which we all know
10 is incredibly expensive and burdensome, and there is no
11 suggestion that there's any communications out there
12 that would relate to it. And the books and records
13 related to the filings are publicly available, and he
14 can go down and look at them, pretty much whenever he
15 wants, during normal business hours. That might be a
16 better place to start. He can see what was filed, who
17 filed -- you can't see who filed because names aren't
18 taken, but you can see the documents on file, how they
19 were treated and what happened with the ballot.

20 MR. LESTER: I can't see that -- again, I'll
21 prepare a list of items requested but I can't conceive
22 of how at this stage that Mr. Kitzinger could indicate
23 that every relevant, material item that we would
24 request for this lawsuit is publicly available. There
25 are a lot of internal communications, I'm quite sure.

1 Mr. Tiraco observed a lot of things that went on that
2 certainly would not be in the public record and that
3 should be discoverable.

4 So at this point, I would like to have an
5 opportunity to draft certainly a list of
6 interrogatories and document requests, and whatever is
7 publicly available, we'll obtain publicly.

8 THE COURT: I'm not going to stay discovery
9 right now. I did look at Rivera Powell and I'm not
10 sure -- I only skimmed it -- that the claims were
11 raised in the same manner. It was primarily a due
12 process claim and the Second Circuit -- the equal
13 protection claim was somewhat different.

14 MR. KITZINGER: Rivera Powell does not
15 require that claims be raised in the state court, only
16 that the Article 16 already be available. And it's
17 very clear -- I don't know -- I'm not going to convince
18 you here.

19 THE COURT: I don't spend two days doing
20 research for a conference. I do know something about
21 election law and I did read Rivera Powell, so what can
22 I say? I read the pre-motion letter and did briefly
23 consider some of the issues raised.

24 MR. PEPPER: Well, the first issue from the
25 state court --

1 THE COURT: I'm not going to hear argument
2 on it. There's nothing to discuss right now, until the
3 pre-motion letters are filed. I think it's almost
4 pointless having a further discovery conference, except
5 if there are issues you can't resolve. If you need --
6 if you feel justified in moving for a stay, you'll move
7 for a stay.

8 I'll set a March discovery deadline. That
9 should give you enough time.

10 MR. LESTER: Yes.

11 MR. KITZINGER: Then the election will be
12 done.

13 MR. LESTER: But there are broader issues
14 involved beyond just this election.

15 THE COURT: So March 15th. I assume there
16 will be no further amendments contemplated after --
17 beyond this point.

18 MR. LESTER: After this one, correct.

19 MR. KITZINGER: I assume that's fact
20 discovery. I don't know if we need any expert
21 discovery or --

22 THE COURT: That's fact discovery. I don't
23 think you're raising claims that require an expert.

24 MR. LESTER: Well, I mean, there are people
25 expert in this field. I'm not sure, again, what the

1 relevance of that -- of people expert in the issue of
2 ballot access and statistical analysis and so forth
3 but --

4 THE COURT: We'll discuss that later on.
5 Let me first see what your proposed amended complaint
6 looks like. We'll address that issue and then if we
7 need to have a conference after that, we will. But in
8 any event, I will schedule an end of discovery
9 conference.

10 MR. LESTER: Thank you, I appreciate that.

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18 I certify that the foregoing is a correct
19 transcript from the electronic sound recording of the
20 proceedings in the above-entitled matter.
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25 ELIZABETH BARRON

August 17, 2012